



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

THE KING
Appellant

and

SEBASTIEN BECHAUD
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of the Issues

2. The appeal presents the following issues:

- (a) whether s 50 of the *Juries Act 2000* (Vic) (**the Act**) requires, as a precondition to the availability of the power conferred by s 50(1), that there be a proximate temporal connection between the taking of the 'separation oath' described in s 50(2)¹ and the first occasion on which the trial judge allows the jury to separate during its deliberations;

- (b) whether s 50 of the Act establishes any presumption that the separation oath, once taken by jurors at any time in the trial, 'endures' in a manner which is necessarily sufficient to ensure not only the integrity of the verdict from outside influence, but also that the verdict appears not to have been affected by any outside influence; and

¹ Namely, an oath or affirmation 'in the form of Schedule 5' to the Act.

- (c) whether the majority of the Court below was correct to conclude² that there had been a fatal and fundamental irregularity in the trial in circumstances where the trial judge had permitted the jury to separate after retiring to consider its verdict having failed ‘to take a separation oath or affirmation from the jury at times sufficiently proximate to its separation during deliberation’.³

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

- 10 3. The respondent considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required to be given.

Part IV: Factual Matters in Contention

4. The relevant facts are set out at COA Judgment [3]–[11] **CAB 86–7**, and [31]–[33] **CAB 91**. The respondent does not take any issue with the accuracy of the summary at AS [5]–[12].
- 20 5. Several aspects of the chronology relevant to this appeal should, however, be emphasised. The separation oath was administered before the jury left court for the day on Wednesday, 24 July 2024, shortly after empanelment and at the conclusion of the trial judge’s preliminary directions.⁴ The trial judge gave no reasons for having the separation oath administered at such an early stage of the trial. The prosecutor opened the prosecution case the following day.⁵ The prosecution case closed on Thursday, 1 August 2024.⁶
6. After the trial judge’s charge to the jury, the jury retired to consider its verdicts at 2:34pm on Friday, 2 August 2024.⁷ By then, nine days had elapsed since the administration of the separation oath. During those nine days, the trial judge

² The judgment of the Court of Appeal has now been reported: *Bechaud v The King* (2025) 79 VR 95 (‘COA Judgment’).

³ COA Judgment, [29] **CAB 91**.

⁴ COA Judgment, [3] **CAB 86**; **ABFM 14**.

⁵ COA Judgment, [4] **CAB 86**.

⁶ COA Judgment, [6] **CAB 86**.

⁷ COA Judgment, [7] **CAB 86**.

did not remind the jury at any point of the separation oath which they had taken, the obligation imposed by that oath, and its continuing effect. The jury were permitted to separate on that Friday afternoon, after further directions in response to two jury questions, without the separation oath being re-administered, and without any reminder of the separation oath taken on 24 July 2024.⁸ The transcript does not record any consideration being given by the trial judge or counsel to whether the power in s 50(1) of the Act to allow separation should be exercised in those circumstances, at that point in time.

- 10 7. Therefore, having retired to considered their verdict, the jury were allowed to separate over the weekend without the separation oath having been re-administered, or the importance and effect of that oath or affirmation having been reinforced by the trial judge. The jury continued to deliberate on Monday, 5 August 2024. Once again, the jury were permitted to separate that afternoon without the trial judge having re-administered the separation oath, or having reminded the jurors of that oath or affirmation.⁹ After further deliberations, the jury returned its verdicts at 4:02pm on Tuesday, 6 August 2024.¹⁰

20 **Part V: Statement of the Argument**

Section 50 of the Juries Act

8. Section 50(1) of the Act confers powers which a trial judge may exercise ‘after the jury has retired to consider its verdict and before the verdict is given...’. Relevantly, s 50(1)(a) confers a power to ‘allow the jury to separate’. It is a discretionary power in the sense that the trial judge may decide whether or not to exercise that power, and it requires an evaluative judgment as to whether the jury should be allowed to separate having regard to the risks separation might pose to the integrity of the jury’s verdict.
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⁸ COA Judgment, [8] **CAB 87**.

⁹ COA Judgment, [10] **CAB 87**.

¹⁰ COA Judgment, [11] **CAB 87**.

9. Section 50(2) provides a ‘condition precedent’ to the exercise of the powers conferred by s 50(1).¹¹ That is made clear by the words ‘only if’ in s 50(2). The ‘condition precedent’ is that ‘each separating juror has taken an oath or made an affirmation in the form of Schedule 5’. Section 50(2) does not provide that the administration of the separation oath, while a necessary pre-condition to jury separation, is (necessarily) sufficient to ensure the integrity of a jury’s verdict.

10 Nor does s 50 expressly set out any requirement as to when the ‘separation oath’ must be administered relative to the separation of the jury during deliberations. In that way, s 50 differs from s 42 of the Act. Section 42 provides that the oath or affirmation set out in Schedule 3 to try the issues in the trial ‘faithfully and impartially’ must be taken by jurors ‘on being empanelled’. Other provisions within Part 6 of the Act describe powers that may be exercised ‘during a trial’.¹²

20 11. However, the fact that s 50 does not expressly define any temporal relationship between the administration of the oath and the jury’s separation during deliberations does not signal a legislative intent that the administration of the oath *at any time* in the trial is necessarily sufficient. Having regard to the context and purpose of s 50, that would be to stretch too far the language in fact used by the legislature.

The purpose of s 50, and its history

12. In Victoria, ‘it was a cardinal common law principle that in a criminal jury trial jurors not separate during deliberations’.¹³ In *R v Chaouk*,¹⁴ Kaye J traced the history of the common law rule,¹⁵ and noted that while it was by then (in 1986) ‘exceptional’ for jurors to be kept together from the commencement of

¹¹ See, eg, *R v Clarke* (2002) 5 VR 480, [11]–[13] (O’Byrne AJA), quoting *R v Taylor* (1996) 86 A Crim R 293, 302 (Southwell AJA).

¹² See, eg, s 43 (as to a trial judge’s power to discharge a juror without discharging the whole jury); AS [17].

¹³ *Youssef (a pseudonym) v The Queen* [2019] VSCA 240, [56] (Priest, Beach and Weinberg JJA).

¹⁴ [1986] VR 707 (‘*Chaouk*’).

¹⁵ [1986] VR 707, particularly at 710–11.

the trial until the discharge of the jury, the rule remained that ‘there must be no communication, or risk of communication, between outsiders and the jury once they have entered upon their deliberations concerning their verdict’.¹⁶ The purpose of the rule was to maintain the integrity of the jury’s verdict by protecting jurors ‘from those who might, consciously or otherwise, influence their verdict’.¹⁷

10 13. This Court considered the historic practice of strict sequestration of jurors during the trial, and the relaxation of that practice over time, in *Brownlee v The Queen*,¹⁸ including by reference to *Chaouk*. In that case, Gaudron, Gummow and Hayne JJ traced the tendency of the law to ‘place more reliance upon the capacity of jurors to heed the directions of the presiding judge as to the conduct of their deliberations, to attend to the evidence and to resist outside influences’.¹⁹ Their Honours endorsed (by quoting with approval the judgment of Grove J in the Court of Criminal Appeal in *Brownlee*) the proposition that ‘it is an essential feature of the jury system that the jury should deliberate upon its verdict uninfluenced by an outsider to the trial process’.²⁰ Moreover, while the tendency of the law had been to place more reliance upon the capacity of jurors to follow directions, Gaudron, Gummow and Hayne JJ accepted that in the exercise of a discretion to allow separation, 20 ‘any relevant prevailing circumstances must necessarily be taken into account in deciding whether the jury should or should not remain sequestered’.²¹

14. In 1993, s 51A of the *Juries Act 1967* (Vic) was enacted by s 9 of the *Juries (Amendment) Act 1993*. That provision was in substantially the same form as the present s 50 of the Act. As noted in *R v Patton*²² (and confirmed by the

¹⁶ [1986] VR 707, 710.

¹⁷ [1986] VR 707, 710.

¹⁸ (2001) 207 CLR 278, [25]–[27] (Gleeson CJ and McHugh J) (*‘Brownlee’*) quoting *Chaouk* [1986] VR 707, 710 (Kaye J). See also at [66]–[67] (Gaudron, Gummow and Hayne JJ).

¹⁹ At [66].

²⁰ At [67], endorsing the judgment of Grove J in the Court of Criminal Appeal in that case: *R v Brownlee* (1997) 41 NSWLR 139, 145G.

²¹ *Brownlee* (2001) 207 CLR 278, [67], quoting and endorsing the judgment of Grove J: *R v Brownlee* (1997) 41 NSWLR 139, 146B.

²² [1998] 1 VR 7 (*‘Patton’*).

Second Reading Speech accompanying the introduction of s 51A set out at AS [27]),²³ s 51A ‘was clearly designed to modify the strictness of the common law practice in favour of convenience to jurors, provided that the requirements imposed by the section were complied with’.²⁴ The power to ‘allow the jury to separate’ conferred by s 51A(1) of the *Juries Act 1967* was in the discretion of the trial judge. Plainly enough, and as the Second Reading Speech confirms, it was a discretionary power to be exercised ‘in appropriate circumstances’.²⁵

10 15. Section s 51A of the *Juries Act 1967* can be seen as striking a balance between convenience to jurors and the need to ensure the integrity of a jury’s verdict against the risk of outside influence during separation. That balance involved a critical safeguard, in the form of the separation oath.²⁶ That safeguard reflected the importance of ensuring the integrity of the jury’s verdict and served the purpose of achieving that end.

20 16. The Court of Appeal considered s 50 of the Act in *Youssef (a pseudonym) v The Queen*.²⁷ The Court noted that in enacting s 50 and its precursor s 51A of the *Juries Act 1967*, ‘the legislature was astute to ensure that the separation of a criminal jury after retirement was subject to safeguards specifically designed to promote the integrity of the trial process and to minimise the risk of the jury’s communication with third parties’.²⁸ The purpose of safeguards within those provisions, albeit they modified the strictness of the common law position, was to ‘protect jury deliberations from contamination’ and to ‘[prevent] the *perception* that there has been any opportunity for unauthorised communications with the jury’.²⁹ Having considered that legislative purpose, the Court stated the practice which it considered ‘desirable’ having regard to the terms of s 50:

²³ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157–1158 (S J Plowman).

²⁴ *Patton* [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA).

²⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157 (S J Plowman).

²⁶ Or in the language of s 51A(2), the ‘undertaking on oath or by affidavit not to discuss with any person, other than another member of the jury, any matter relating (directly or indirectly) to the inquest’.

²⁷ [2019] VSCA 240 (*‘Youssef’*).

²⁸ *Youssef* [2019] VSCA 240, [56] (Priest, Beach and Weinberg JJA).

²⁹ *Youssef* [2019] VSCA 240, [62] (Priest, Beach and Weinberg JJA) (emphasis added).

When first permitted to separate after deliberations commence, the jury take the separation oath (or affirmation) under s 50, and, as a minimum, thereafter are reminded that they are bound by that oath (or affirmation) each time that they separate until being finally discharged.³⁰

17. The Court of Appeal's observations in *Youssef* thereby reinforced the importance of there being temporal proximity between the taking of the oath (or a reminder of the oath) and each occasion the jury is permitted to separate during deliberations. Victorian practice has been consistent in requiring a temporal connection between the taking of the separation oath (or, at least, a reminder by the trial judge as to the terms of, and the continuing obligations effected by, the oath) and each separation during deliberations.

18. It has therefore been consistently understood in Victoria that the administration of the separation oath serves to ensure the integrity of the jury's verdict from outside influence.³¹ It does so by having jurors undertake, in solemn form, to avoid any discussion of the evidence or deliberations with non-jurors. The taking of the oath or affirmation *in the circumstances contemplated by s 50(2) on its correct interpretation* serves the purpose of reducing the risks otherwise presented by separation to a level consistent with the fairness of the trial (and the perception that the accused's trial is fair). The extent to which the separation oath is in fact capable of reducing the risk to the integrity of the verdict must require a case-by-case analysis, turning upon the particular facts of the case and the circumstances surrounding the trial, including the timing of the administration of the oath to jurors.

The judgment of the majority in the Court of Appeal

19. The majority of the Court below (Priest and Kaye JJA) concluded that the temporal disconnect between the taking of the separation oath and the jury's separation in this case was such that the separation oath could not, whilst they were deliberating, have been understood by the jury to have imposed upon it

³⁰ *Youssef* [2019] VSCA 240, [64] (Priest, Beach and Weinberg JJA).

³¹ See also COA Judgment, [21] **CAB 89**.

‘very specific and critical obligations’. Therefore, there had been a fatal and fundamental irregularity in the trial: COA Judgment, [28]–[29] **CAB 90–91**.

20. The conclusions of the majority of the Court below at paragraphs [28]–[29] may be understood as encompassing either of the following propositions:

(a) First, the trial judge did not have the power to exercise the s 50(1) discretion because the temporal disconnect between the administration of the oath and the jury’s separation meant that the s 50(2) condition precedent had not been fulfilled. There was therefore an error or irregularity in the trial resulting in a substantial miscarriage of justice: *Criminal Procedure Act 2009* s 276(1)(b). Such a conclusion is consistent with the majority having upheld Ground 1 in the Court below (which contended that there had been non-compliance with s 50(2): COA Judgment, [12], [34] **CAB 87, 92**).

(b) Secondly, if the discretionary power in s 50(1) were enlivened, the trial judge’s exercise of that power miscarried in circumstances where the jury had not, shortly before the separation, taken the separation oath (or at least been reminded of it). There was therefore an error or irregularity in the trial resulting in a substantial miscarriage of justice: *Criminal Procedure Act 2009* s 276(1)(b).

21. If either of those propositions be correct, then this appeal must be dismissed.

No power to exercise the s 50(1) discretion

22. For the reasons set out below, the words ‘has taken’ in s 50(2) do not mean ‘has taken at any time in the past’. The words ‘has taken’ must be interpreted in a manner consistent with s 50(2) achieving its purpose as a safeguard against the risks posed by separation. The legislature could not have intended otherwise. Moreover, the substantive re-enactment by the legislature of s 51A of the *Juries Act 1967* in the form of s 50 of the Act is consistent with the

legislative endorsement of the Court of Appeal's observations in *Patton* as to the required timing of the administration of the oath relative to the first separation of the jury.³²

Purposive interpretation

10 23. As outlined above, the overarching purpose of s 50 of the Act must be to ensure and/or maintain the integrity of the jury's verdict against the risk of outside influence, while ensuring that the jury need not face the inconvenience of sequestration where that is not required in the circumstances of the trial. Within the scheme created by s 50, the administration of the separation oath is essential to the management of the risk posed by separation. It follows that for the statutory scheme to work as intended, the administration of the oath must in reality be capable of managing that risk. The separation oath must in fact operate, and be seen to operate, upon the minds of the jurors at the time of, and subsequent to, separation.

20 24. The legislature could not have intended that a jury might be permitted to separate during deliberations in circumstances where the administration of the oath took place at a time when it is unlikely to act as an effective safeguard (or where it might be perceived to be an ineffective safeguard). In that regard, the likely effect of the separation oath upon the minds of the jurors must realistically be a function of, among other matters, the time elapsed since that oath or affirmation was made, or the extent to which the taking of the oath is otherwise factually connected to the standard expected of them during their deliberations (for example, by a reminder of the oath or affirmation): COA Judgment, [22], [28] **CAB 89–90**.

30 25. A construction of the words 'has taken' in s 50(2) which ensures that the separation oath in fact operates as an effective safeguard, thereby promoting

³² [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA).

the legislature's purpose, is to be preferred over any other construction that would not promote that most important purpose.³³

26. The words 'has taken' cannot sensibly be construed literally, to incorporate any completed taking of the oath however distant from the time of (that is, prior to) separation, and however unlikely to achieve the statutory purpose. It would be wholly inconsistent with the statutory purpose for an ineffective administration of the oath — because its effect on the minds of jurors is diluted with the passage of time and/or because of the events in the trial since its administration — to fulfill the condition precedent for separation. While the words 'has taken' are grammatically capable of referring to any completed taking of the separation oath, the context and purpose of s 50 require departure from that grammatical meaning.³⁴ This is to apply the statement in *Project Blue Sky Inc v Australian Broadcasting Authority*,³⁵ that:

Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.³⁶

27. Therefore, the majority of the Court below was correct (on the basis that it allowed the appeal on Ground 1 below, as described at paragraph 20(a) above) to treat s 50(2) as requiring a proximate 'temporal or factual connection'³⁷ between the administration of the oath and a jury's first separation during its deliberations. That terminology used by the majority does not appear in s 50. However, context and purpose favour reading the text of s 50(2) as containing

³³ *Interpretation of Legislation Act 1984* (Vic) s 35(a). See also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [23]–[26] (French CJ and Hayne J).

³⁴ *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [14] (Kiefel CJ, Nettle and Gordon JJ): 'Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected' (emphasis added).

³⁵ (1998) 194 CLR 355.

³⁶ (1998) 194 CLR 355, [78] (McHugh, Gummow, Kirby and Hayne JJ), quoted and applied in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [23]–[26] (French CJ and Hayne J), [68]–[69] (Crennan and Bell JJ).

³⁷ COA Judgment, [22], [28]–[29] **CAB 89, 90–91**.

‘implicit words’ of limitation which temporally define the range of oaths or affirmations made by jurors in the form of Schedule 5 capable of fulfilling the s 50(2) condition precedent.³⁸

28. Such implicit limitation may also — *alternatively* to the terminology identified by the majority of the Court below — be achieved by the ‘reading in’ only of a word such as ‘just’ before the word ‘taken’ in s 50(2), to make clear that only a brief preceding time must have elapsed between the taking of the oath and the jury’s separation. Such ‘reading in’ of a temporal qualifier into s 50(2) is not ‘too big, or too much at variance with the language in fact used by the legislature’,³⁹ and for the reasons above, promotes the legislature’s purpose.

29. The above purposive construction rests upon the proposition that s 50 *does not* establish any presumption that the separation oath, once taken, ‘endures’ in a way sufficient to safeguard against risk and to achieve the legislative purpose: cf COA Judgment, [100] (Taylor JA) **CAB 106**; AS [38]–[52]. There are at least seven reasons why s 50 does not establish any such presumption.

30. **First**, s 50 does not state any such presumption. Nothing in s 50 (by contrast to s 42 of the Act) expressly contemplates the administration of the separation oath upon the jury first being empanelled, as occurred in this case.

31. **Secondly**, the separation oath is specific to the standard expected of jurors during deliberations: COA Judgment, [16] **CAB 88**. It is an essential part of the scheme created by s 50 concerning the balance between jury convenience and maintaining an effective safeguard against risk to the integrity of the verdict. It follows that the oath will be administered at the point in time when the trial judge has determined to allow the jury to separate after retiring to consider its verdict(s), pursuant to s 50(1).

32. Moreover, the determination to allow the jury to separate must be made at a point in time proximate to separation where the trial judge, first, determines

³⁸ *Taylor v The Owners — Strata Plan No 11564* (2014) 253 CLR 531, [65] (Gageler and Keane JJ).

³⁹ *Taylor v The Owners — Strata Plan No 11564* (2014) 253 CLR 531, [38] (French CJ, Crennan and Bell JJ); *Lowe v The Queen* (2015) 48 VR 351, [19]–[29], [67] (Warren CJ).

that nothing has occurred during the trial which would render separation inappropriate, and, secondly, perceives that no intervening event will render separation inappropriate. There is no statutory need or reason to administer the oath until the trial judge has determined that the jury should be allowed to separate after retiring. The legislature could not have intended that the jury might take the separation oath at the start of the trial, only for that oath to be rendered redundant because the trial judge later determines not to allow separation by reason of events that occur during the trial. In that context, the legislature could not have contemplated that the separation oath might

10 relevantly ‘endure’.

33. **Thirdly**, the legislature must have intended that the separation oath would have an emphatic effect upon the minds of the jurors at the specific, and critical, moment of the trial with which s 50 is concerned.

34. This point was recently made by the Court of Appeal in *Birchall v The Queen*.⁴⁰ In that case, Boyce, Orr and Kidd JJA reasoned that the ‘trigger for application of the separation oath safeguard’ selected by the legislature is the ‘transition point’ where the final stage of the trial is reached (namely, the

20 ‘jury’s decision-making stage’).⁴¹ In the Court’s judgment, there was a ‘logical reason’ for the legislature’s selection of that point in the trial as the ‘trigger’. Among other matters, ‘[t]he legislature can be taken to have reasoned that from this point, the stakes are raised, the jurors’ responsibilities are heightened, and the dangers associated with improper influence are elevated.’⁴² The separation oath is intended to ‘bring home’ to the jury, at that ‘transition point’ in the trial, ‘the critical importance of needing to resist outside influences’.⁴³

35. Section 50 must therefore be construed in a manner that ensures that the

30 separation oath emphasises, or ‘brings home’, to jurors their obligations in a manner that is connected to the specific moment in the trial to which the

⁴⁰ [2026] VSCA 63 (*‘Birchall’*).

⁴¹ *Birchall* [2026] VSCA 63, [93].

⁴² *Birchall* [2026] VSCA 63, [93(e)] (Boyce, Orr and Kidd JJA).

⁴³ *Birchall* [2026] VSCA 63, [93(f)] (Boyce, Orr and Kidd JJA).

section relates. That is not achieved by administration of the oath at a time removed from the jury's first separation after retiring to consider their verdicts. The requirement for jurors to take the separation oath is not 'triggered' before that critical point.⁴⁴ There is then no room for any presumption that an earlier taking of the oath 'endures'.

36. **Fourthly**, and at risk of repetition, it would be a most surprising result if the legislature had intended to establish a presumption that administration of the oath *at any time*, in any trial, was sufficient to safeguard against risk. The absurdity of that proposition is manifest given the many factors which influence the extent to which an oath taken at an early stage of the trial might act as a realistic safeguard to the integrity of the verdict. Those factors include the duration of the trial, the extent of any media interest in the trial and any publicity during the trial concerning the trial or the events the subject of and/or related to the trial, the public interest in the trial at the locality where the trial is held, and the extent of stress and emotion experienced by jurors during the trial and their deliberations.⁴⁵

37. The legislature could not sensibly have intended that the administration of the separation oath after empanelment, without any subsequent reminder, would be sufficient to safeguard the integrity of a jury's verdict in all cases. It simply could not be so capable in the case of, for example, a 10-month trial (particularly, for example, where such a trial involves confronting subject matter and attracts significant media publicity): cf AS [52].

38. **Fifthly**, it may be expected that jurors would ordinarily follow, and obey, the terms of an oath or affirmation previously made, just as jurors are ordinarily taken to understand and to follow judicial directions. However, as is also the case with judicial directions, other case-specific considerations may tell against any *assumption* that jurors will recall and understand, and comply

⁴⁴ *Birchall* [2026] VSCA 63, [97] (Boyce, Orr and Kidd JJA).

⁴⁵ *Brownlee v The Queen* (2001) 207 CLR 278, [155]–[156] (Kirby J).

with, the terms of their oath or affirmation.⁴⁶ Any such assumption is not immutable.

39. **Sixthly**, neither *Patton*⁴⁷ nor *R v Appleby*⁴⁸ is authority for the proposition that a separation oath, once given, ‘endures’ irrespective of when it is administered. As Taylor JA noted, those cases did not directly concern the question whether s 51A of the *Juries Act 1967* required any specific temporal nexus between the administration of the oath and separation: COA Judgment, [71] **CAB 99**. In both *Patton* and *Appleby*, the separation oath had in fact been administered proximate to the jury’s first separation during deliberations.

40. The statements in *Patton* that requiring jurors to renew their undertaking ‘on each occasion thereafter of separation *during the same deliberation process* would be an extravagance not contemplated by the section’, and ‘it should be assumed that they [the jurors] will understand that such oath will continue to bind them’ must be seen to be premised upon the jurors having taken their oath or affirmation ‘when the time first arrive[d]’ during the deliberation process.⁴⁹

41. Further, the statement in *Appleby* that ‘[i]t would be an unusual phenomenon in the law to have people repeating oaths in the way suggested when the first was in terms adequate for any subsequent situation’⁵⁰ must be seen in context. While the jury in that case was required to return its verdicts progressively in relation to different groups of charges, and the jury was not required to re-take the oath on each and every occasion they were allowed to separate, the oath was administered upon the jury’s first separation during deliberations (and at points subsequently).⁵¹ Therefore, the oath was administered at a time when it would have made clear the jurors’ obligations during deliberations.

⁴⁶ See, eg, *Moore (a pseudonym) v The King* (2024) 282 CLR 460, [42] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ).

⁴⁷ *Patton* [1998] 1 VR 7.

⁴⁸ *R v Appleby* (1996) 88 A Crim R 456 (*‘Appleby’*).

⁴⁹ *Patton* [1998] 1 VR 7, 11 (Phillips CJ, Winneke P, Southwell AJA) (emphasis added).

⁵⁰ (1996) 88 A Crim R 456, 484 (Smith AJA).

⁵¹ (1996) 88 A Crim R 456, 481 (Smith AJA).

42. **Seventhly**, the heading to Schedule 5 of the Act is '[o]ath or affirmation of jurors separating during deliberations'.⁵² The natural reading of that heading indicates a temporal connection of imminence between the taking of the oath or affirmation by jurors, and the moment of separation.

Re-enactment

43. The above purposive construction is supported by the fact that s 50 was enacted following the Court of Appeal's consideration of s 51A of the *Juries Act 1967* in *Patton*. As noted above, the question in *Patton* concerned the required contemporaneity between administration of the oath and the jury's first separation. The question to be resolved was whether there was a need to re-administer or 'renew' the oath on each subsequent separation. However, the Court of Appeal relevantly stated:

On the contrary it [the discretion to allow the jury to separate] is a discretion to be exercised by the trial judge when, *during the deliberation process*, he considers that it is appropriate to allow the jury to separate "at any time" within that process. In our view the words of the section suggest that *when the time first arrives*, the individual jurors must give the undertaking required of them.⁵³

44. The legislature may be taken to have been aware of this expression of principle by the Court of Appeal when it substantially re-enacted s 51A of the *Juries Act 1967* in the form of s 50.⁵⁴ There is no indication in s 50 of the Act that the legislature intended to alter the understanding of the 1993 provision described in *Patton* by allowing the jury to separate where there had been a (significant) temporal disconnect between oath and separation. Parliament can be taken to have intended that the words 'has given' in s 50(2) would be understood to import the same temporal connection between oath and separation as the Court of Appeal in *Patton* must have discerned in the words 'has given' in the former s 51A(2) of the *Juries Act 1967*.⁵⁵

⁵² That heading forms part of the Act: *Interpretation of Legislation Act 1984* (Vic) s 36(1)(b).

⁵³ [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA) (emphasis added).

⁵⁴ *R v Clarke* (2002) 5 VR 480, [13] (O'Bryan AJA).

⁵⁵ See, eg, *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177, [51] (Gageler, Gordon and Steward JJ): 'Where Parliament repeats words which have been judicially construed, it can be taken to have intended the words to bear the meaning already judicially attributed to them'.

The correct construction

45. For the reasons above, s 50(2) requires a ‘temporal or factual connection’⁵⁶ between the administration of the separation oath and a jury’s first separation during its deliberations. That construction does not introduce any inherent uncertainty into s 50 of the Act: cf AS [57]. The question of whether the required ‘temporal or factual connection’ has been satisfied may sometimes require a value judgment in borderline cases, but the majority’s test is a workable one. And such borderline cases are likely to be rare in any event, given that trial judges may be expected to adhere to the ‘best practice’ described in *Youssef*: COA Judgment [108] **CAB 108**.

46. Finally, the decision in *Frendo v The King*⁵⁷ does not support the appellant’s arguments concerning uncertainty. In that case, the separation oath had been taken on the Friday before the Monday on which the jury was charged by the trial judge, and having retired to consider its verdicts, separated thereafter.⁵⁸ Importantly, when the jurors left the court on the Monday afternoon, the trial judge reminded the jurors of the oath they had taken (on the Friday afternoon).⁵⁹ That reminder reinforced to the jurors the ongoing application of their oaths or affirmations during their deliberations. There was, therefore, at least a ‘factual connection’ between the taking of the separation oath and the jury’s first separation.

Error in the exercise of the s 50(1) discretion, if enlivened

47. Even if the s 50(1) power were enlivened in this case by fulfilment of the s 50(2) precondition, the trial judge’s exercise of that power was nevertheless in error. If the respondent’s submission above as to required temporal or factual proximity not be accepted, then 50(2) must nevertheless describe a necessary, but not a sufficient, condition for the proper exercise of the s 50(1) power.

⁵⁶ COA Judgment, [22], [28] **CAB 89, 90**.

⁵⁷ [2024] VSCA 319 (*Frendo*).

⁵⁸ [2024] VSCA 319, [130]–[131] (Boyce JA).

⁵⁹ [2024] VSCA 319, [132] (Boyce JA).

That power must always be exercised reasonably and consistently with the need to ensure a fair trial (and the perception of a fair trial). And for the reasons above at paragraphs [30]–[42], the power must be exercised without reference to any presumption — unstated in the legislative text — that the separation oath ‘endures’.

48. Like the provision of the *Jury Act 1977* (NSW) considered by this Court in *Brownlee*,⁶⁰ the discretion reposed in the trial judge by s 50(1) ‘enables the judge to form an opinion, in the circumstances of a particular case, as to whether separation is incompatible with the need to protect the integrity of the jury’s verdict’.⁶¹ In forming that opinion, the trial judge must necessarily be required to take into account the relevant considerations which affect the extent of the risk of separation to the integrity of the jury’s verdict. Section 50(2) does not purport to define or circumscribe the range of considerations relevant to a trial judge’s exercise of the discretion conferred by s 50(1).

49. In the circumstances of this case, separation was not compatible with the need to protect the integrity of the jury’s verdict. Nine days (including one weekend) had passed between the administration of the oath and the jury’s separation during deliberations, with a further weekend passing before verdict four days after first separating. Unlike in *Frendo*, the jury were *never* reminded of their oath or affirmation. There was therefore a real risk that the jury would not have perceived the separation oath to bind them during their deliberations. The accumulated wisdom of Victorian courts as to the appropriate timing of the administration of the oath so as to effectively safeguard the integrity of the jury’s verdict, set out in *Patton* and *Youssef*, was simply ignored or overlooked. What occurred here was a significant departure from the approach consistently adopted and authoritatively endorsed in Victoria.⁶²

⁶⁰ (2001) 207 CLR 278. Section 54(b) of the *Jury Act 1977* (NSW) then provided that ‘the jury in criminal proceedings ... may, if the court so orders, be permitted to separate at any time after they retire to consider their verdict’.

⁶¹ (2001) 207 CLR 278, [28] (Gleeson CJ and McHugh J).

⁶² See generally *Alec (a pseudonym) v The King* (2023) 72 VR 161, [40]–[48] (Priest, Walker and Taylor JJA).

50. It does not follow from the fact that s 50(1) requires a trial judge to make an evaluative assessment that any degree of appellate restraint should apply. While it is drafted in open-ended terms, the proper exercise of the s 50(1) discretion turns upon whether separation is compatible with the need to protect the integrity of a jury's verdict. The exercise of the s 50(1) power either is, or is not, so compatible. There is no reason why, particularly given the importance of safeguarding the integrity of the verdict, the legislature might have intended that s 50 should tolerate 'a range of outcomes'⁶³ as to whether it was appropriate to exercise the s 50(1) power at the particular point in time it was exercised, having regard to what had transpired in the trial to that point. Alternatively, and in any event, the trial judge's decision to allow the jury to separate was unreasonable in the sense described in *House v The King*.⁶⁴

Substantial miscarriage of justice

51. The error or irregularity that occurred in this case related to an indispensable attribute of a fair trial: the integrity of the jury's verdict against outside influence.⁶⁵ It impacted upon that indispensable attribute of a fair trial by reducing the level of protection against the risk of outside influence to a point less than that considered necessary by the legislature.

52. Parliament cannot have intended that a conviction might stand where the safeguard against integrity risk contemplated by s 50, and considered necessary by the legislature, had not been put in place or had not been employed. The legislature must have intended that a reasonable exercise of the s 50(1) power (where the precondition in s 50(2) was fulfilled) was necessary to address the risk presented by jury separation to a degree sufficient to ensure a fair trial, and the perception of a fair trial.⁶⁶

⁶³ *Moore (a pseudonym) v The King* (2024) 282 CLR 460, [15] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ).

⁶⁴ (1936) 55 CLR 499.

⁶⁵ *Brownlee* (2001) 207 CLR 278, [67] (Gaudron, Gummow and Hayne JJ), endorsing the proposition that 'it is an essential feature of the jury system that the jury should deliberate upon its verdict uninfluenced by an outsider to the trial process'.

⁶⁶ As to the importance of the perception that an accused's trial is fair in this context, see *R v Clarke* (2002) 5 VR 480, [19] (O'Bryan AJA).

53. Therefore, the consequence of a failure to comply with s 50 — the separation of the jury after retirement contrary to law — is ‘a serious departure from the prescribed processes for trial’⁶⁷ such that, without more, a substantial miscarriage of justice results.⁶⁸ That must *at least* be so in a case such as this where the separation of the jury following the non-compliance with s 50 in this case was protracted.⁶⁹ At risk of repetition, the breach of s 50 in this case resulted in the jury separating over a weekend, and again on the following Monday evening, without the statutorily-mandated safeguard being in place.

10 54. The appeal should be dismissed.

Part VI: Statement of the Respondent’s Argument on Notice of Contention or Notice of Cross-Appeal

55. Not applicable.

Part VII: Time Estimate

20 56. It is estimated the respondent will require up to 60 minutes for oral submissions.

Dated: 25 June 2026



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⁶⁷ See, eg, *Baini v The Queen* (2012) 246 CLR 469, [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [65] (Gageler J); *Awad v The Queen* (2022) 275 CLR 421, [86]–[88] (Gordon and Edelman JJ).

⁶⁸ *Criminal Procedure Act 2009* (Vic) s 276(1)(b).

⁶⁹ Cf *Birchall* [2026] VSCA 63, [134]–[138] (Boyce, Orr and Kidd JJA).

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Juries Act 2000</i> (Vic)	Current (Version 60) as in force from 10 February 2025.	ss 42, 60; Schedule 5	Current version of the Act. There has been no material amendment to the provisions cited in these submissions between the time of trial and the present.	
2.	<i>Interpretation of Legislation Act 1984</i> (Vic)	Current (Version 134) as in force from 1 May 2026	ss 35, 36(1).	Current version of the Act.	
3.	<i>Juries Act 1967</i> (Vic)	Version 45	s 51A	Final version before repeal. Provision in form construed in cases cited in submissions above, including <i>Patton</i> .	
4.	<i>Criminal Procedure Act 2009</i> (Vic)	Current (Version 113) as in force from 1 May 2026	s 276	Current version of the Act.	